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NO. 86-2059

In The

Supreme Court of the United States

October Term, 1986

SHERIFF, FALL RIVER COUNTY JAIL, and JEFF TARELL — JAILER OF FALL RIVER COUNTY JAIL,

Appellants,

v.

STANLEY L. HUGHES,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO DISMISS APPEAL

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For the sake of brevity Appellee incorporates by reference Appellants' Opinions Below, Jurisdiction, Constitutional and Statutory provisions, Statement of the Case and Appendix.

THE APPEAL SHOULD BE DISMISSED

Pursuant to United States Supreme Court Rule 16.1(d) Appellee moves to dismiss this appeal inasmuch as it deals with a statute unique to South Dakota thus it does not afford this Court with an opportunity to resolve a conflict among federal courts over this particular statute. South Dakota Codified Law 15-2-22 provides that:

> If a person entitled to bring an action other than for the recovery of real property, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of action accrued, either:
>
> (1) Within the age of minority as defined in Chapter 26-1;
>
> (2) Mentally ill; or
>
> (3) Imprisoned on a criminal charge; or in execution under the sentence of a criminal court for a term less than his natural life; the time of such disability is not a part of the time limited for the commencement of the action.
>
> The period within which the action must be brought cannot be extended more than five years by any such disability except infancy, nor can it be extended in any case longer than one year after the disability ceases.
>
> The provisions of this section shall not apply to actions for the foreclosure of any real estate mortgage, by action or by advertisement.
>
> The provisions of subdivision (3) do not apply to federal civil rights cases.

SDCL 15-2-22 is unique in that despite its availability to individuals incarcerated for a term less than life if they

being a personal injury action the legislature has specifically forbidden its application if the same individuals bring a 28 U.S.C.S. § 1983 cause of action even though the facts to be proven and the witnesses to be called are the same in each case.

This is not the appropriate case or time to decide whether the fifty states' tolling provisions for incarcerated individuals are archaic and should be abolished. Nor is it an appropriate time to determine whether Mr. Hughes was disabled under South Dakota's statutory scheme as he clearly fits into SDCL 15-2-22(3). Rather, this Court should, as the United States Court of Appeals for the Eighth Circuit did, limit its inquiry to whether SDCL 15-2-22 discriminated against federal rights actions and was inconsistent with federal law. This is the sole issue before this Court and it is respectfully argued that this Court should not expand its inquiry into areas that were not and need not be decided. SDCL 15-2-22 is on its face blatantly hostile to federal civil rights actions and is therefore inconsistent with federal law thereby warranting dismissal of this appeal.

Appellants cite to *Hawthorne v. Wells*, 761 F.2d 1514, 1515 (11th Cir. 1985); *Perotti v. Carty*, 647 F.Supp. 39 (W.D. Ohio 1986); *Vargas v. Jago*, 636 F.Supp. 425 (S.D. Ohio 1986); *Campbell v. Guy*, 520 F.Supp. 53 (E.D. Mich. 1981), aff'd without opinion, 711 F.2d 1055 (6th Cir. 1983), cert. denied, 464 U.S. 1051 (1984), in support of their contention that there is conflict among federal courts in the application of prisoner tolling provisions to federal civil rights actions. None of the cases cited involved a statute which excluded § 1983 actions from the respective state's

tolling provisions as South Dakota's does. It appears that the *Perotti* and *Vargas* decisions held that incarceration in and of itself under Ohio's statutory scheme is not a disability when suing state officials thus its tolling provisions could not be invoked for § 1983 actions.

The *Perotti* Court relied heavily on the *Vargas* decision. *Perotti v. Carty,* 647 F.Supp. 39, 40 (W.D. Ohio 1986). The *Vargas* Court examined Ohio's statutory scheme, particularly Ohio Rev. Code §§ 2743.01 - .73 which provided:

> Civil actions against the state permitted by . . . shall be commenced no later than two years after the date of the accrual of the cause of action. . . . The period of limitations shall be tolled pursuant to section 2305.16 of the Revised Code, except there shall be no tolling during imprisonment unless the imprisoned person is of unsound mind. Ohio Rev. Code § 2743.16 (emphasis added).

> Section 2743.16 is of recent vintage and makes clear, we think, that the General Assembly does not consider imprisonment per se to be a disability in all cases. And, in a broad sense, suits filed against the state in the Court of Claims are of a similar ilk to suits filed against state officers under Section 1983 in the federal courts. Thus we conclude, for purposes of Section 1983 suits brought by prisoner over the condition(s) of their confinement, that the fact of incarceration, in and of itself, is not enough to toll the relevant statute of limitations. *Vargas v. Jago,* 636 F.Supp. 425, 429 (S.D. Ohio 1986).

Arguably, Ohio's tolling provisions are unavailable for either personal injury actions or § 1983 actions against state officials when incarceration is alleged to be the sole disability. South Dakota's statute is distinguishable from

Ohio's cases and statutory scheme inasmuch as South Dakota requires a prisoner to only show incarceration for a term less than life to be deemed disabled for purposes of its tolling statutes. Additionally, only § 1983 are precluded from its tolling statutes thus a South Dakota prisoner, unlike an Ohio prisoner, is deemed disabled for purposes of bringing a personal injury action but not for § 1983 actions. Lastly, the Ohio cases and the *Hawthorne* decision are distinguishable because those statutes provided that a case is tolled until an individual's sentence is completed. Thus a person incarcerated for thirty-five years could toll a statute for as many years whereas South Dakota requires that " . . . the period within which the action must be brought cannot be extended more than five years by any such disability (imprisonment) except infancy." SDCL 15-2-22.

Appellees' argue that excluding § 1983 actions from its tolling provision has a rational basis as public entities and state actors are entitled to know at the end of a given period that their exposure and liability is over. That a cutoff is important so that those individuals and entities can adopt budgets. Additionally, that claims become stale over time, memories fade, witnesses disappear and records are lost or destroyed. These arguments fail as one must, in any event, bring Appellee's actions within eight (8) years. SDCL 15-2-22. There is "no rational basis for distinguishing between § 1983 actions and actions for injury to the person in light of the purposes for which statute of limitations are generally prescribed . . . (inasmuch as) . . . the facts to be proven, the witnesses to be called to testify, the evidence to be considered are generally the same for § 1983 actions as for state actions brought to com-

pensate for the personal injury underlying the deprivation of federal constitutional rights." *Johnson v. Davis,* 582 F.2d 1316, 1319 (4th Cir. 1978). If Mr. Hughes was to bring a personal injury action to compensate for the personal injury underlying the deprivation of his constitutional rights he would have eight (8) years to bring his lawsuit as that is all he is afforded under the State's personal injury tolling provisions. Here, he brought the lawsuit within three and one-half years of the alleged injury and was well within the time the legislature has previously deemed a reasonable period to bring an action to address personal injuries at the state court level. Under South Dakota's current statutory scheme a mentally ill individual, whether incarcerated for a term less than life or not, who alleges that he was raped would have eight (8) years to bring his lawsuit whether it was a personal injury or § 1983 cause of action. SDCL 15-2-22. Arguably, the same testimony that would have to be presented in the incarcerated mentally ill person's personal injury lawsuit as would have to be presented in Mr. Hughes' § 1983 lawsuit. Thus, precluding Mr. Hughes lawsuit while allowing a prisoner, a mentally ill person or an incarcerated mentally ill person to bring a state claim for personal injury and § 1983 claim under the latter of the two when, in essence, the same parties and testimony will be involved does not promote intrastate uniformity, evidences blatant hostility toward § 1983 claims, has no rational basis and is clearly inconsistent with federal policy.

Prior to 1986 South Dakota provided that any action brought under the Federal Civil Rights statutes must be commenced within two years after the alleged constitutional deprivation even though it had a three year negli-

gence statute of limitations. This Court held in *Wilson v. Garcia,* 471 U.S. 261, 85 L.Ed.2d 254, 107 S.Ct. 1938 (1985) that § 1983 claims are best categorized as personal injury actions for statute of limitation purposes. Thus, in 1986 the South Dakota legislature amended its special civil rights statute so that one had three years in which to bring on an action for a civil rights violation which is the same limitation period for personal injury actions. Despite a civil rights cause of action now being afforded the same limitation period as a personal injury cause of action the legislature failed to amend its tolling provisions so that a civil rights cause would be afforded the same tolling provisions as a personal injury cause of action.

The issue is whether SDCL 15-2-22 is inconsistent with federal policy when it excludes individuals incarcerated for a term less than life from South Dakota's tolling provisions merely because they bring a § 1983 action. "Because there is no federal statute of limitations applicable to suits alleging violations of civil rights, the court must apply the most appropriate state statute of limitation." *Cross v. General Motors Corporation,* 778 F.2d 468, 469 (8th Cir. 1985). 42 U.S.C.S. § 1983 claims are best categorized as personal injury actions for statute of limitation purposes. *Wilson v. Garcia,* 471 U.S. 261 85 L.Ed.2d 254, 107 S.Ct. 1938 (1985).

"When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." *Id.* at 260. "This requirement emphasizes the predominance of the federal interest in the borrowing process, taken as a whole." *Id.* at 262. Additionally, this Court expressly rejected the notion that one is to look to particular facts or

the precise legal theory because counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each § 1983 claim. Arguably this Court felt that § 1983 should therefore be classified as personal injury actions for limitation purposes as the "federal interest in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that the Congress favored this simple approach." *Id.* at 266. The borrowing of local statutes cannot discriminate against the civil rights remedy. *Id.*

A state's "tolling rules (govern) federal actions brought under 42 U.S.C.S. § 1981 (42 U.S.C.S. § 1981) except when inconsistent with the federal policy underlying the causes of action under consideration." *Board of Regents v. Tomanio,* 446 U.S. 478, 64 L.Ed.2d 440, 448, 100 S.Ct. 1990 (1980). Although the need for national uniformity has not been held to warrant the displacement of state statute of limitations for civil rights actions . . . uniformity within each state is entirely consistent with the borrowing principle contained in § 1988. *Wilson v. Garcia,* 471 U.S. 261, 85 L.Ed.2d 254, 266, 107 S.Ct. 1938 (1985). Dictum suggest that when a federal court borrows a state statute of limitation it should borrow any applicable provision along with the tolling provision. *Id.* at 105 S.Ct. at 1943 nt. 17.

Here, the portion of SDCL 15-2-22(3) which specifically excludes civil rights causes of action from the tolling provisions afforded to other similarly situated Plaintiffs who bring personal injury actions must fall inasmuch as the special civil rights exclusion is, amongst other things, inconsistent with federal law and policy, promotes intrastate differences, unconstitutionally discriminates against

and is hostile to federal causes of action, undervalues the constitutional values at stake in § 1983 actions inasmuch as the limitation period and tolling provisions for all personal injury actions created by state statute would be much longer if tolling provisions applied.

In *Republic Pictures Corporation v. Kappler,* 151 F.2d 543 (8th Cir. 1945), aff'd per curiam without opinion, 327 U.S. 757 (1946) Plaintiff's contract claim was governed by either a five or ten year state statute of limitations. However, merely because the Plaintiff asserted his contract claim pursuant to a federal statute of limitations he was subjected to a six month statute of limitations. The Eighth Circuit Court refused to apply the Iowa statute which subjected the Plaintiff to a much shorter statute of limitations. The Eighth Circuit stated:

> A state may not discriminate against rights accruing under federal laws. *McKnett v. St. Louis & S.F.R. Co.,* 292 U.S. 230 [(1934)]; *Pufahl v. Estate of Parks,* 299 U.S. 217 [(1936)] . . .
>
> . . . [Plaintiff's] claim or cause of action is discriminated against solely because it arises under a federal state. This discriminatory treatment . . . in effect makes inferior congressional enactments and rights which under our jurisprudence are intended to be paramount and supreme . . .
>
> Here, that state has singled out federal claims . . . as such and has prescribed a shorter period of limitations for the bringing of such actions than that prescribed for the bringing of similar actions arising or based upon other federal laws. The statute violated Article 6 of the Constitution . . . (and) would result in denying to those seeking to assert such claims, the equal protection of the law, 14th Amendment, Constitution, Sec. 1. . . . 151 F.2d at 546-47.

SDCL 15-2-22 is analogous to the Iowa statute as it prescribes a shorter limitation period than those governing analogous state law claims when a claim is asserted pursuant to a federal statute.

Virginia had a statutory scheme whereby its two year statute of limitations for personal injuries was amended by adding a paragraph which singled out and subjected 42 U.S.C.S. § 1983 claims to a one year limitation period. Virginia's special statute of limitations for § 1983 actions was struck down and the two year personal injury statute of limitations was deemed to govern all § 1983 causes of action. The Court ruled that "a state limitation period which evidences hostility or discrimination toward a federal cause of action will not be adopted by federal court. . . . The discrimination toward federal rights in the (special § 1983 provision) is apparent: analogous, torts arising under state law were not similarly limited; nor was an attempt made to rationally prescribe a limitation period for § 1983 suit in terms of the object of litigation." *Edgerton v. Puckett,* 391 F.Supp. 463, 465 (D. VA 1975).

Subsequently, in *Johnson v. Davis,* 582 F.2d 1316 (4th Cir. 1978), it was held that Virginia's special one year statute of limitations for civil rights actions could not apply, rather Virginia's two year personal injury statute of limitations applied to § 1983 claims. The *Johnson* Court reasoned that to uphold a special one year civil rights action statute of limitation would "disregard the constitutional values to be protected by those actions and would condone an unreasonable discrimination between the assertion of federally protected rights and rights protected under Virginia law." *Id.* at 1317. The Court reasoned that it could not adopt a special limitation period for

1983 actions, "because to do so would be to undervalue the constitutional values at stake in § 1983 actions without rationally prescribing a limitation period for those actions in light of the object of litigation as required by Virginia law . . . (that adopting the special one year period) . . . would be to impose an unreasonably discriminatory limitation period on the assertion of important federally protected rights . . . (and) . . . constitutional tort remedies which were intended to be available where state tort remedies, although available in theory, were not available in practice." *Id.* at 1319. Additionally, there was "no rational basis for distinguishing between § 1983 and actions for injuries in light of the purposes for which statutes of limitations are generally prescribed . . . (inasmuch as) . . . the facts to be proven, the witnesses to be called to testify, the evidence to be considered are generally the same for §1983 actions as for state actions brought to compensate for the personal injury underlying the deprivation of federal constitutional rights." *Id.*

In *Matthewman v. Akahane,* 574 F.Supp. 1510 (D. HI 1983), the Court held that Hawaii's one-year statute of limitations for actions brought for recoveries authorized by federal statute although not an unauthorized act or per se unreasonable or suspect, was nonetheless unconstitutionally discriminatory against and hostile to federal causes of action, inasmuch as limitation periods for nearly all actions created by state statute would be longer. Thus, the statute fell. *Edgerton, Johnson* and *Matthewman* are analogous to the case at bar as § 1983 claims were singled out from the statutory limitation scheme and given shorter times then state personal injury actions to bring on a law-

suit. Here, failure to afford Mr. Hughes the same tolling provision afforded a personal injury case shortened the period to bring his suit from seven (7) years, the time tolled for personal injury cases, to two years which was South Dakota's preamend civil rights statute of limitations. This resulted in Mr. Hughes' Complaint purportedly not being filed in a timely manner. Although *Matthewman* was decided prior to the *Wilson* decision, it noted that "state limitation periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute." *Id.* at 1516 ft.nt. 5. The Plaintiff in *Matthewman* argued that it was not the one year period per se which was being attacked but the fact that it was shorter than the statute of limitations for all other state claims. *Id.* at 1515. This is exactly Mr. Hughes' position. "The notion that a state should not discriminate against or express hostility to federal causes of action is a theme that is consistently repeated by the U.S. Supreme Court, albeit mostly in dicta. See, *McKnett v. St. Louis & S.F.R. Co.*, 292 U.S. 230, 234, 78 L.Ed. 1227, 1229, 54 S.Ct. 690, 692 (1934); *Miles v Illinois C.R. Co.*, 315 U.S. 698, 704, 86 L.Ed. 1129, 1134, 62 S.Ct. 827, 830, 146 A.L.R. 1104 (1942); *Pufahl v Parks*, 299 U.S. 217, 227, 81 L.Ed. 133, 139-140, 57 S.Ct. 151, 157 (1936). See also, *U.S. v. Little Lake Misere Land Co.*, 412 U.S. 580, 595-597, 37 L.Ed.2d 187, 93 S.Ct. 2389, 2398-2399, (1973). (State statute which is plainly hostile to the interests of the United States would not be borrowed). SDCL 15-2-22 special civil rights exclusion is plainly hostile to the interest of the United States. *Id.* at 1516.

"The law seems to be clear, therefore, that a state may not discriminate against federal causes of action in

favor of state claims of 'equal dignity and like character'. When this occurs the state statute may be struck down as unconstitutional." *Id.* at 1519. Mr. Hughes merely wants to be afforded the same limitation and tolling provisions as prisoners similarly situated when they bring on an analogous state claim.

South Dakota's attempt to forbid the application of its personal injury tolling provisions to § 1983 causes which effectively shortens the limitation period is inconsistent with federal policy as it clearly discriminates against those who are attempting to vindicate their civil rights and circumvents the federal policy interest in insuring the uniformity. Clearly, abolishing the tolling provisions, as they apply to an individual incarcerated for a term less than life when he brings a civil rights action on, creates a special class of individuals, i.e. prisoners, who must bring federal causes of action sooner than others. Minors or mentally ill individuals can invoke the tolling provisions if they file a § 1983 claim even if the same facts and testimony were produced by a prisoner bringing a § 1983 claim. There is no rational basis for this inasmuch as the facts, evidence and witnesses to be called to testify in both a personal injury suit and a 1983 causes of action are, in all probability, equal.

The Appellant argues that the rule which tolls the statute of limitations for imprisonment stems from the outdated common law doctrine that a convicted felon was civiliter mortuus (civilly dead) thus Mr. Hughes should not be afforded the tolling provision because he had access to the Court. This argument must fail. Although statutes which provide that a state prisoner is deemed to be under a legal disability and therefore can toll the running of

the statutes are "hopelessly archaic in an era when the ready access of prisoners to the courts, state and federal, is constitutionally guaranteed", *Bailey v. Faulkner,* 465 Fed.2d 102, 103 (7th Cir. 1985), South Dakota's legislature has nonetheless maintained it for those who bring personal injury actions. SDCL 15-2-22(3). Thus, if one is to apply the legislature's tolling provisions to all persons who bring personal injury actions in state court it must also apply the same to all those persons who bring federal causes of action based on the same underlying state theme in order to have intrastate uniformity. This is especially true since generally, the same evidence is presented in a § 1983 action as is presented in a personal injury case.

Additionally, a South Dakota prisoner is not deemed "civilly dead" as he must in any event bring a lawsuit within eight (8) years even if he will be imprisoned for another fifty years. Finally this Court in *Board of Regents v. Tomanio,* 446 U.S. 478, 64 L.Ed.2d 440, 100 S.Ct. 1490 (1980) has held that federal courts are to borrow a state's tolling provisions. Counsel respectfully submits that it cannot be reasonably inferred from the *Board of Regents* opinion that application of a state's tolling provisions should be completely barred if, and only if, a plaintiff prisoner brings a § 1983 action.

In *Acoff v. Abston,* 462 F.2d 1543 (11th Cir. 1985), a lawsuit was brought against the city approximately one year after the alleged injury. The city moved for summary judgment based upon a statute which provided: " . . . Claims for damages (against the city) growing out of torts shall be presented within six months from the

accrual thereof or shall be barred." The Court denied the Motion for Summary Judgment as it held per *Wilson* "federal law governs the characterization of Section 1983 claims for statute of limitation purposes and that all Section 1983 claims should be characterized as tort claims for recovery of damages for personal injury. Hence, the applicable statute of limitations in each state should be one generally applicable to claims for personal injury. The federal policy of intra-state uniformity among different 1983 claims, relied upon by the Court in *Wilson* would prevent federal courts from using a different statute of limitations in Section 1983 claims depending on whether a municipality was named as a defendant. This Court cannot, therefore, borrow the (statute) as the most appropriate and analogous state statute." *Id.* at 1546. The *Acoff* Court also noted that a statute of limitation which shortens a time for suing a municipality in relation to other defendants might violate the policies underlying the remedy provided in § 1983. *Id.* at ft.nt. 3 1547. Here, we have the flip side. Rather than limiting the time when certain defendants may be sued under § 1983, South Dakota's statutory scheme limits the time in which certain Plaintiffs, i.e. prisoners, may bring a § 1983 action.

—o—

CONCLUSION

The statute in question is unique to South Dakota and is clearly inconsistent with federal policy and law, unconstitutionally discriminates against and is hostile to federal causes of action, undervalues the constitutional

values at stake in § 1983 claims and does not promote intrastate uniformity, therefore appellee asks that this appeal be dismissed.

Repectfully submitted,

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